Layangan Sdn Bhd v MP Factors Sdn Bhd (No 2)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–22–1840 OF 2000
ABDUL WAHAB SAID AHMAD J
9 FEBRUARY 2006

Contract — Assignment — Factoring agreement — Whether the transaction is a money lending transaction disguised as a factoring facility — Whether permitted to charge the initial payment charges, factoring commission and late payment charges/refactoring charges — Whether such charges constitute a penalty — Contracts Act 1950 s 75

The plaintiff is a construction company that was awarded a contract to build a housing development project by the developer Seberang Majujaya Sdn Bhd ('the customer'). The plaintiff approached the defendant and was followed by a factoring agreement. Pursuant to the terms of the factoring agreement the plaintiff and the defendant, the plaintiff had sold to the defendant and the defendant had purchased from the plaintiff the debts that were due and owing by the customer to the plaintiff. A debenture was executed by the customer and the continuing guarantee of several individual directors of the plaintiff secured the facilities. The plaintiff alleged that the defendant had imposed wrongful commission charges for factoring when it failed to claim for the debts from the customer. The defendant was also alleged to have failed to take into consideration the amount paid by the plaintiff to reduce the amount in arrears. The plaintiff claimed all the monies that it has paid under the factoring agreement the sum of RM10,470,798.39 on the ground that the charges that the defendant imposed are wrongful and illegal. The defendant counterclaimed for the sum of RM6,361,466.78. The plaintiff's learned counsel said that the agreement is clearly an ongoing money lending transactions and not plain factoring, leaving it incumbent on the defendant to obtain either a license or seek exemption under the Moneylenders Act 1951. The defendant's learned counsel said that the buying and selling of a bill at a discount is not money lending per se. However, where the conduct of the defendant's business is concerned it is not that of acting as a purchaser of a discounted bill. It should not seek recourse from the vendor when the customer defaulted in payment, but instead rolled over the defaulting balance and levy an interest charge called 'initial factoring charge' continuously. The plaintiff alleged that failure or refusal of the defendant to seek recourse from the customer tainted this transaction with illegality. He also submitted that the defendant charged usurious interest rates. From 2000 onwards the rate increased to 22% pa. On the 22% rate, the learned counsel for the defendant explained that during the currency crisis the rates were astronomical and as a cost it had to be passed on to the vendor. The question is whether the defendant is permitted to charge the initial payment charges ('IPC'), factoring commission ('PC') and late payment charges/refactoring charges ('LPC') or whether such charges constitute a penalty.

Held, allowing the counterclaim with costs:

(1) There really is one question that is left to be determined after all the evidence and submissions that had ensued. The question is whether the transaction is a money lending transaction disguised as a factoring facility. The main criterion in order to determine whether the defendant's business really is money lending as opposed to factoring is by looking at the real nature of a factoring business and the terms of the factoring agreement itself. A factoring agreement involves the assignment of book debts. An assignment of book debts is not a moneylending transaction (see *Consolidated factoring (M) Sdn Bhd v Tong Teik Co Sdn Bhd & 2 Ors* [1993] 1 CLJ 115). The factoring agreement involves the total assignment of debts by the plaintiff to the defendant. All the pre-requisites of the agreement were fulfilled. The various schedules in Form A whereby the plaintiff offered to sell its debts due by the customer to the defendant together with all the relevant and supporting invoices certificates of payment due under the building contract were duly submitted by the plaintiff to the defendant. The defendant had accepted the said offers and purchased the said debts and paid the plaintiff the initial payments in accordance with the terms of the factoring agreement. The customer was notified of the sale by a notice of assignment endorsed on the invoices (see para 36).

(2) The defendant had the contractual right to vary the rate to be charged in terms of the IPC and FC from time to time and had duly notified the plaintiff of the same. Evidence was given that the FC was charged on each invoice for the services rendered by the defendant to the plaintiff in processing the Schedules and invoices submitted and also to render monthly statements of account to both the plaintiff and the customer. As for increase of the IPC and FC from 11.75% to 22% and from 0.75% to 1.25%, judicial notice is taken that they were mainly at the time when the financial and currency crises occurred in late 1997 and 1998 and that all borrowings at that time attracted very high interest rates (see paras 30–32).

(3) Even though the IPC is varied from time to time, at a rate that is similar to the normal interest rate in a bank loan, it is not caught by Section 75 of the Contracts Act. Likewise the LPC is also not caught by s 75 of the Contracts Act since it is only imposed on each and every invoice amount which remains outstanding after 160 days. The IPC on the other hand is charged on the Initial Payments made from the date of funding. The IPC and LPC are not the same as additional interest as they are not charged side by side and also not charged on the same money lent or owed for the same span of time. In any event the charges are agreed upon (see paras 34–35).

(4) In failing to seek recourse from the vendor when the customer defaulted in payment, the defendant had explained that the plaintiff had made various proposals to the defendant to settle its outstanding debt due under the factoring facilities and the customer and the plaintiff had also entered into a Form of Agreement dated 12 June 2000 with the defendant whereby the plaintiff, Layangan Sendirian Berhad (the plaintiff in D8–22–1841 of 2000) and the customer had all confirmed being indebted to the defendant for the sums stated therein and had also proposed to settle its debts. The plaintiff and the customer had made various proposals and it is understandable why at that

stage the defendant had not taken recourse against the customer under the circumstances. The fact that the defendant had deferred recourse against the customer does not convert the transaction to one of moneylending (see para 42).

(5) From the testimony of witnesses and the contemporaneous documents before the court, the defendant had complied with section 21(1) of the Banking and Financial Institutions Act 1989 ('BAFIA') in respect of a factoring business, a scheduled business listed under the third schedule of the BAFIA as acknowledged by Bank Negara Malaysia and that no evidence was led to prove otherwise. Since the plaintiff did not pay the sum of RM10,470,798.39 to the defendant therefore there is no basis to seek the refund of that sum. Accordingly, the plaintiff's claim is dismissed with costs. On the counterclaim, the defendant had validly terminated the factoring agreement pursuant to cl 25(1)(b) and properly demanded from the plaintiff and the guarantors vide its solicitors' letter dated 7 March 2000. Therefore the defendant's counterclaim of RM6,361,466.78 is allowed with costs against all defendants (see para 43).

[Bahasa Malaysia summary

Plaintif adalah sebuah syarikat pembinaan yang diawardkan kontrak untuk membina sebuah projek perumahan oleh pemaju perumahan Seberang Majujaya Sdn Bhd ('pelanggan tersebut'). Plaintif telah ke defendan dan ini diikuti dengan satu perjanjian pemfaktoran. Mengikut terma-terma perjanjian pemfaktoran plaintif dan defendan, plaintif menjual kepada defendan dan defendan membeli daripada plaintif kesemua hutang yang perlu dibayar dan terhutang oleh pelanggan tersebut kepada plaintif. Satu debentur ditandatangani oleh pelanggan dan jaminan berterusan oleh beberapa pengarah individu plaintif menjamin kemudahan tersebut. Plaintif menyatakan bahawa defendan telah salah dalam mengenakan caj komisen untuk pemfaktoran apabila ia gagal menuntut hutang daripada pelanggan. Defendan juga dinyatakan gagal mengambil kira jumlah yang dibayar oleh plaintif dalam mengurangkan jumlah tertunggak tersebut. Plaintif menuntut kesemua wang yang ia telah bayar di bawah Perjanjian Pemfaktoran tersebut yang berjumlah RM10,470,798.39 atas alasan bahawa caj-caj yang dikenakan oleh defendan adalah salah dan menyalahi undang-undang. Defendan menuntut balas jumlah sebanyak RM6,361,466.78. Peguamcara plaintif menyatakan bahawa perjanjian tersebut adalah jelas merupakan satu transaksi meminjam wang yang berterusan dan bukannya hanya pemfaktoran, yang dengan nyata memerlukan defendan memiliki satu lesen atau mendapatkan pengecualian di bawah Akta Pemberipinjam Wang 1951. Peguamcara defendan yang bijaksana menyatakan bahawa diskaun yang diberikan dalam pembelian dan penjualan bil bukannya satu pinjaman wang per se. Akan tetapi, di mana ia berhubungan dengan perniagaan defendan, ia bukan bertindak sebagai pembeli bil yang telah didiskaunkan. Ia tidak sepatutnya menuntut daripada penjual apabila pelanggan tidak membuat bayaran, tetapi sepatutnya menggolekkan keingkaran pembayaran tersebut dan mengenakan levi caj faedah yang dipanggil 'initial factoring charge' secara berterusan. Plaintif menyatakan kegagalan atau keengganan defendan menuntut daripada pelanggan mencemarkan transaksi ini dengan kesalahan undang-undang. Beliau juga menghujahkan bahawa defendan

mengenakan kadar faedah yang berlampau. Daripada 2000 ke atas, kadar dinaikkan kepada 22% setahun. Atas kadar 22% tersebut, peguamcara bijaksana defendan menjelaskan ia adalah semasa krisis matawang dan kadar adalah teramat tinggi pada masa tersebut dan kos terpaksa dibebankan kepada penjual. Soal sekarang ialah sama ada defendan dibenarkan membuat caj bayaran pendahuluan ('CBP'), Komisyen Pemfaktoran ('KP') dan caj-caj bayaran lewat/caj pemfaktoran semula ('CBL') ataupun caj-caj sedemikian merupakan penalti.

Diputuskan, membenarkan tuntutan balas dengan kos:

(1) Hanya satu soalan yang tinggal untuk diputuskan selepas diikuti dengan kesemua bukti dan penghujahan. Soalannya ialah sama ada transaksi tersebut ialah satu transaksi meminjam wang yang menyamar sebagai kemudahan pemfaktoran. Kriteria utama untuk memastikan sama ada perniagaan defendan adalah sebenarnya meminjam wang dan bukannya pemfaktoran ialah melihat sifat sebenarnya perniagaan pemfaktoran dan terma-terma perjanjian pemfaktoran tersebut. Sesuatu perjanjian pemfaktoran meliputi penyerahan hak hutang buku. Satu penyerahan hak hutang buku bukan satu transaksi meminjam wang (lihat *Consolidated factoring (M) Sdn Bhd v Tong Teik Co Sdn Bhd & 2 Ors* [1993] 1 CLJ 115). Perjanjian pemfaktoran meliputi penyerahan hak sepenuhnya hutang-hutang oleh plaintif kepada defendan. Segala pra-syarat perjanjian tersebut telah ditunaikan. Jadual-jadual di Borang A di mana plaintif membuat tawaran untuk menjual hutang yang perlu dibayar oleh pelanggannya bersama kesemua invois yang relevan dan menyokong, sijil pembayaran yang perlu dibayar di bawah kontrak pembinaan telah dihantar seperti yang sepatutnya oleh plaintif kepada defendan. Defendan telah menerima tawaran tersebut dan membeli hutang-hutang tersebut dan membayar plaintif bayaran pendahuluan mengikut terma-terma perjanjian pemfaktoran tersebut. Pelanggan telah dimaklumkan akan penjualan tersebut melalui satu notis penyerahan hak yang diindorskan di atas invois-invois (lihat perenggan 36).

(2) Defendan mempunyai hak kontraktual untuk mengubah kadar yang akan dicajkan di dalam terma-terma CBP dan KP dari masa ke semasa dan telah memaklumkan kepada plaintif seperti yang sepatutnya akan pengubahan tersebut. Keterangan telah diberikan bahawa KP yang dicaj terhadap setiap invois untuk perkhidmatan-perkhidmatan yang diberikan oleh defendan kepada plaintif dalam memproses Jadual-jadual dan invois-invois yang dihantar dan juga satu penyata bulanan akaun kepada kedua-dua plaintif dan pelanggan. Berhubungan dengan kenaikan CBP dan KP daripada 11.75% ke 22% dan daripada 0.75% ke 1.25%, notis kehakiman diambil di mana ia adalah pada masa-masa di mana krisis mata wang dan kewangan berlaku pada akhir 1997 dan 1998 dan kesemua pinjaman pada masa tersebut menarik kadar faedah yang amat tinggi (lihat perenggan 30–32).

(3) Walaupun CBP diubah dari masa ke semasa, pada kadar yang lebih kurang sama dengan kadar faedah yang biasa untuk satu pinjaman bank, ia tidak jatuh di bawah s 75 Akta Kontrak. Begitu juga CBL yang juga tidak jatuh di bawah s 75 Akta Kontrak oleh kerana ia hanya dikenakan pada setiap satu invois

di mana amaun yang perlu dibayar masih belum dibayar selepas 160 hari. CBP pula hanya dicaj terhadap caj pendahuluan yang dilakukan pada tarikh pembiayaan wang tersebut. CBP dan CBL adalah tidak sama dengan faedah tambahan oleh kerana mereka tidak dicajkan sebelah-menyebelah dan juga tidak dicaj di atas wang yang sama yang dipinjam atau dihutang pada jangka masa yang sama. Dalam apa jua pun, caj-caj itu telah dipersetujui (lihat perenggan 34–35).

(4) Dalam kegagalan menuntut daripada penjual apabila pelanggan ingkar membayar, defendan telah menjelaskan bahawa plaintif telah memberikan beberapa cadangan kepada defendan untuk menyelesaikan hutang yang kena dibayar di bawah kemudahan pemfaktoran tersebut dan pelanggan dan plaintif juga telah memasuki satu perjanjian bertarikh 12 Jun 2000 dengan defendan di mana plaintif, Layangan Sendirian Berhad (plaintif di kes D8–22–1841 tahun 2000) dan pelanggan tersebut telah bersetuju berhutang kepada defendan untuk jumlah yang dinyatakan dan juga telah bercadang untuk menyelesaikan hutang-hutang tersebut. Plaintif dan pelanggan tersebut telah membuat beberapa cadangan dan dapat difahamkan kenapa pada masa tersebut defendan tidak menuntut terhadap pelanggan dalam keadaan itu. Defendan dalam menangguhkan tuntutannya terhadap pelanggan tidak mengubahkan transaksi tersebut kepada meminjam wang (lihat perenggan 42).

(5) Daripada keterangan saksi-saksi dan dokumen-dokumen sebelum mahkamah, defendan telah menuruti s 21(1) Akta Bank dan Institusi-Institusi Kewangan 1989 (ABIK) berhubung dengan perniagaan pemfaktoran, satu perniagaan yang dijadualkan dan disenaraikan di bawah Jadual Tiga ABIK seperti yang diakui oleh Bank Negara Malaysia dan tiada sebarang bukti yang diberikan yang menyatakan sebaliknya. Oleh kerana plaintif tidak membayar jumlah RM10,470,798.39 kepada defendan dengan itu tiada alasan untuk menuntut kembali jumlah tersebut. Dengan itu tuntutan plaintif ditolak dengan kos. Berhubungan dengan tuntutan balas, defendan telah secara sah menamatkan perjanjian pemfaktoran mengikut klausa 25(1)(b) dan dengan betul telah menuntut daripada plaintif dan penjamin-penjamin melalui surat peguamcaranya bertarikh 7 Mac 2000. Dengan itu, tuntutan balas defendan untuk jumlah RM6,361,466.78 dibenarkan dan kos terhadap kesemua defendan-defendan (lihat perenggan 43).]

Notes

For cases on factoring agreement, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2187–2192.

Cases referred to

Boustead Trading Sdn Bhd (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Bumiputra Merchant Bank Berhad v The Melewar Corporation Berhad & 2 Ors [1990] 2 CLJ 30 (refd)

Consolidated factoring (M) Sdn Bhd v Tong Teik Co Sdn Bhd & 2 Ors [1993] 1 CLJ 115 (folld)

Kok Swee Chin v General factoring & Credit Sdn Bhd [2004] 6 MLJ 276 (refd)

Olds Discount Co Ltd v John Playfoir Ltd [1938] 3 All ER 275 (refd)

A *Pusat Bandar Damansara Sdn Bhd v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513 (refd)

Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (in receivership) [1996] 2 MLJ 461 (refd)

SS Maniam v The State of Perak [1957] MLJ 75 (refd)

B *Selva Kumar a/I Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817 (refd)

Sunder Koer v Sham Kishen [1906] 341 AC 917 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s (l)(a), 21(1), 3rd Schedule

C Contracts Act 1950 s 75

Moneylenders Act 1951

AJ Dason (Maria Pereira with him) (Maria V Pereira & Associates) for the plaintiff. Simon Hue (Soh Sze Jean with him) (Simon Hue & Associates) for the defendant.

D

Abdul Wahab Said Ahmad J:

(Counterclaim)

E

[1] The plaintiff ('Layangan Bina') is a construction company that was awarded a contract to build a housing development project known as 'Taman Damai' at Lot 2144 Bandar/Pekan Sidam Kanan, District of Kulim, Kedah, by the Developer — Seberang Majujaya Sdn Bhd ('the customer'). Layangan Bina approached the

F defendant ('MP Factors') and was followed by a factoring agreement (defined by the Banking and Financial Institutions Act 1989, in s (1)(a) as 'the business of acquiring debts due to any person.' The debts in question were architect certificated progress claim certificates that Layangan Bina had and would have in future, as a financial claim against the customer for construction works done. MP Factors agreed to purchase debts to the value of RM3,000,000 by the factoring agreement on 18 July

G 1996 and proceeded to do so. This facility was later increased by RM500,000. A debenture was executed by the customer and the continuing guarantee of several individual directors of Layangan Bina secured the facilities. Layangan Bina alleged that MP Factors had imposed wrongful commission charges for factoring when it failed to claim for the debts from the customer. MP Factors was also alleged to have

H failed to take into consideration the amount paid by Layangan Bina to reduce the amount in arrears. Layangan Bina claimed all the monies that it has paid under the factoring agreement the sum of RM10,470,798.39 on the ground that the charges that MP Factors imposed are wrongful and illegal. Layangan Bina also prayed for an injunction to restrain the MP Factors from commencing any legal action against Layangan Bina.

I

[2] MP Factors counterclaimed for the sum of RM6,361,466.78 from Layangan Bina. Beside Layangan Bina, four others were named as the second to fifth defendants in the counterclaim as guarantors under the agreement by virtue of a 'Continuing Guarantee and Indemnity' dated 17 July 1996.

[3] At the trial, Layangan Bina and MP Factors each called a witness. At the end of the trial, the learned counsels on both sides submitted before me. In his submissions, Layangan Bina's learned counsel said that the agreement is clearly an ongoing money lending transactions and not plain factoring, leaving it incumbent on MP Factors to obtain either a license or seek exemption under the Act. Layangan Bina quoted *Kok Swee Chin v General factoring & Credit Sdn Bhd* [2004] 6 MLJ 276 where the court held that in the absence of any Ministerial exemption under the Money Lenders Act 1951, the purchaser would have no power to lend money and therefore the factoring business will be deemed to be a money lending business. The factoring company there did have the necessary exemption. In the present case, Layangan Bina alleged that MP Factors did not have such an exemption. The only relevant period to consider is therefore the date of the agreement.

[4] Layangan Bina's learned counsel said that the buying and selling of a bill at a discount is not money lending per se. However, where the conduct of MP Factor's business is concerned it is not that of acting as a Purchaser of a discounted bill. It should not seek recourse from the vendor when the customer defaulted in payment, but instead rolled over the defaulting balance and levy an interest charge called 'initial factoring charge' continuously. Layangan Bina alleged that failure or refusal of the factoring company to seek recourse from the customer tainted this transaction with illegality.

[5] Recounting the mechanics of a factoring agreement, Layangan Bina's learned counsel said that MP Factors will purchase the invoice of Layangan Bina for its face value. Layangan Bina as the contractor is entitled to invoice Seberai Majujaya Sdn Bhd for progress claim certificates issued by the architect. The contractual relationship between the parties is a discounting of the debt value. The factoring agreement was said to have allowed for the purchase of up to a maximum of 80% of the invoice value of the certificate. In addition, MP Factors charged Layangan Bina a 0.2% minimum charge on the unutilized portion of the gross value of the invoices and additionally charged a re-factoring commission.

[6] Layangan Bina said that it was unclear what was re-factored since it was only a roll over of unpaid balances. Under the agreement, MP Factors had a right to hold a contingency reserve at its discretion, to pay off Layangan Bina's liability to repay the advance. Because of the complexity of the relationship, Layangan Bina relied solely on the monthly statements of accounts rendered by MP Factors. After the commencement of the relationship, Layangan Bina failed to settle the shortfall in payment made by the customer or repurchased the debt. This resulted in additional interest being levied by MP Factors for the purchased debt. Layangan Bina contended that MP Factors was only interested in rolling over the purchased debt. It never earned its factoring fee because it never looked to the customer for payment. MP Factors was said to have accepted payment indiscriminately, from any source (both the Layangan Bina and Seberai Majujaya Sdn Bhd).

[7] The purchase of the progress claims was said to have appeared to be on the face of it factoring by MP Factors. The transaction was a money lending transaction in the sense that MP Factors charged the factoring charge and interest rate in negative

monthly levy. This secured a differential between the face value of the progress claim and the amount released to Layangan Bina. Meanwhile, additional penalty interest was charged for non-payment by the due date. Seberai Majujaya Sdn Bhd unfixed assets were secured by a debenture and its land by a land charge. It was further said that Layangan Bina was deemed to have defaulted to repurchase when Seberai Majujaya Sdn Bhd defaulted and failed to pay on the factored certificates.

[8] Layangan Bina's learned counsel went on to refer to the evidence adduced and said that it points to the roll over of monthly liability rather than the exercise of the right to demand re-purchase by MP Factors. On 16 November 1997, MP Factors first refused to factor new invoices. Layangan Bina's director said in his evidence that the refusal of MP Factors to purchase new certificates resulted in a cash flow crisis in Layangan Bina and Seberai Majujaya Sdn Bhd leading to non-payment and due invoices re factored. It was further adduced that a relationship had existed between Layangan Bina and Seberai Majujaya Sdn Bhd to the knowledge of MP Factors. This is further proven by the letter's demand for a collateral security from Seberai by way of a debenture and fixed charge over its landed asset. Layangan Bina's learned counsel submitted that the transactions envisaged by the factoring facilities agreement and supplemental documentation were clearly designed to facilitate money lending activities from MP Factors to Layangan Bina and the mechanics of the transactions carried out and reported in the monthly statement is the lending of money for interest at an usurious rate. According to the learned counsel, the parties treated the purchase payment as a loan that could be carried forward, like an overdraft facility with a bank, as long as interest was levied on the outstanding balances. It was alleged that MP Factors defaulted in performance of their discretionary obligations under the factoring facilities agreement, leading to a default in repayment by Seberai and by Layangan Bina on re-purchase or roll over. Layangan Bina's learned counsel, referring to the monthly invoices of MP Factors said that the effective yearly rate charged was around 12.7% p.a., until the end of September 1997. This included the penalty rate, the effective interest rate, the unutilized portion rate, the factoring charge of 0.7% and the re-purchase penalty rate. From 30 September 1997 it rose to 13.4% and on 30 November 1997 to 15.1% and from 1 January 1998 to 19.3%. On 31 March 1998, it went up to 23.5% and settled at about 22% thereafter, after the alleged default by Layangan Bina and has remained so until the commencement of the proceedings.

[9] Layangan Bina's learned counsel surmised that MP Factors was carrying out moneylending because what was purchased was no more than a chose in action, a right to sue for money on a projected liability, in money terms of a future debt. MP Factor was aware at all times that the relationship between Layangan Bina and Seberai was that of two parties, so closely intertwined in equity holding and management control, as to be akin to be one party and the fiction of the debt purchase was merely to finance its current account deficit and in providing of a short term loan for working capital of the project. Further, MP Factors did not discriminate between Layangan Bina and Seberai in the payment of the debt. It accepted money from either party. In factoring it could either collect from the debtor or force Layangan Bina to purchase but not be indiscriminate in accepting

from any source. That is what a bank financing an overdraft account would do but then again a bank is exempted from the provisions of the Money Lending Act 1951

[10] He went on to say that just like an overdraft account, it accounted for the running account liability, setting of payment from either party as a reducing balance but levied its interest on monthly balances outstanding. It did not make calls on default on any one debt that Seberai failed to pay on due date, as it would have done if it were purely a factoring agreement or demand re-purchase of the debt by Layangan Bina as authorized by the agreement, if MP Factors is a mere purchaser of book debts. Instead, it preferred to roll over the liability for more interest and penalties.

[11] This conduct of factoring without demand for repayment, allowing it to levy default interest and penalty charges was money lending, such that it subsequently applied for and obtained an exemption under the Act. If it did not conduct its business as money lender, there was no need to apply for exemption.

[12] MP Factors never asked Layangan Bina to re-purchase the debt on default of payment by the customer, as it was entitled, choosing instead to roll it over for penalty interest and additional charges despite continuous default by Seberai in paying the invoices in full on due dates.

[13] He next contended that only a lender will ask for security and the right to vary the interest rate — here referred to as 'initial purchase charges' and prefer to roll over the liability rather than have it re-purchased. MP Factors had several securities — ie the guarantees, the debenture and land charge and a difference of at least 20% between the amounts paid on each invoice and the face value of the certificate. This was later increased to 30% to reduce the impact of the interest. It was a paper improvement as no new invoices were factored after that charge.

[14] He concluded by saying that MP Factors charged usurious interest rates. From 2000 onwards the rate increased to 22% pa with no bearing on the cost of funds supporting its lending the unpaid balance due on the account. To support the usurious interest rates, Layangan Bina's learned counsel said that the cost of funds in factoring agreements by MP Factors did not exceed 8% yet its rate went to even a high of 22%.

[15] Layangan Bina's teamed counsel referred to authorities on the issue of whether the penalty interest rate charged by MP Factors is recoverable under s 75 of the Contracts Act 1950. The first authority is *Selva Kumar a/l Murugiah v Thigarajah a/l Retnasamy* [1995] 1 MLJ 817 which overruled *SS Maniam v The State of Perak* [1957] MLJ 75. *Selva Kumar* applied the following principal tests:

[16] Firstly 'the retrospective test' in *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (in receivership)* [1996] 2 MLJ 461, where Peh Swee Chin (FJ) applied the Privy Council decision in *Sunder Koer v Sham Kishen* [1906] 341 AC 917 'where the stipulation is retrospective and increased interest runs from the date of the

bond, not merely from the date of default, it is always considered a penalty because an additional money payment in that case becomes immediately payable.'

[17] Second 'the agreed upon test' in *Pusat Bandar Damansara Sdn Bhd v Yap Han Soo & Sons Sdn Bhd* [2000] 1 MLJ 513 where the Court of Appeal reversed the position to pre-*Selva Kumar* days, treating it as a test for compliance with s 75, by saying that the parties agreed to the terms and therefore it was reasonable.

[18] On the question of the onus of establishing the right to the contractually imposed penalty, when challenged under s 75, Layangan Bina said that MP Factors must prove the penalty imposed is a genuine pre-estimate of reasonable damages. On the cost of funds to MP Factors, Layangan Bina's learned counsel referred to the evidence of DW1 in her cross examination who said that the MP Factors' cost of funds did not exceed 8%. On the 22% rate, she explained that during the currency crisis the rates were astronomical and as a cost it had to be passed on to the vendor. Layangan Bina said that MP Factors through DW1 could not explain why the rate was carried on thereafter, in the running account balance and why it is still being claimed as the interest rate governing the outstanding balances.

[19] MF Factors' learned counsel, in her submissions said that the transaction is not a money lending transaction disguised as a factoring facility. She said that MP Factors had complied with s 21(1) of the Banking and Financial Institutions Act 1989 ('BAFIA') in respect of a factoring business, a scheduled business listed under the Third Schedule of the BAFIA as acknowledged by Bank Negara Malaysia.

[20] Recapitulating the facts, MP Factors' learned counsel said that Layangan Bina had applied to MP Factors and had been granted factoring facilities. Pursuant to the terms of the factoring agreement entered into between Layangan Bina and MP Factors, Layangan Bina had sold to MP Factors and MP Factors had purchased from Layangan Bina the debts that were due and owing by Seberai to Layangan Bina. The various schedules in Form A whereby Layangan Bina offered to sell its debts due by the customer to MP Factors together with the relevant supporting invoices and certificates of payment due under the building contract were duly submitted by Layangan Bina to MP Factors. MP Factors had accepted the said offers and purchased the said debts and paid Layangan Bina the initial payments in accordance with the terms of the debts of the factoring agreement. Seberai was notified of the sale and assignment of the debts of Layangan Bina to MP Factors vide the notice of assignment endorsed on the invoices.

[21] MP Factors' learned counsel further stated that the issue of whether the transactions under a factoring Agreement are money lending transactions has already been decided by the High Court in the case of *Consolidated Factoring (M) Sdn Bhd v Tong Teik Co. Sdn Bhd & 2 Ors* [1993] 1 CLJ 115. His Lordship Dato' Abdul Hamid Mohamad J (as he was then) said 'Undang-undang adalah jelas bahawa 'factoring agreement' yang melibatkan ptenjualan 'book debts' bukanlah satu transaksi memberi pinjaman wang.'

[22] MP Factors' learned counsel further referred to the case of *Olds Discount Co Ltd v John Playfoir Ltd* [1938] 3 All ER 275 which was referred to by the High Court in the case of *Consolidated Factoring (M) Sdn Bhd v Tong Teik Co Sdn Bhd & 2 Ors*. It was held that the transaction therein was a sale of book debts and not moneylending transaction, and it was therefore enforceable.

[23] To further drive home the point, MP Factors' learned counsel referred to the article entitled *Legal Aspects of Factoring* by Ho Peng Kee. It was stated that 'Factoring is the absolute assignment by one party (the 'client' or 'assignor') to another party 'the factor' or 'assignee') of debts owed by a third party (the 'customer' or 'debtor') to whom goods or services have been provided by credit by the client. The arrangement is not one of loan but of sale whereby debts owed to the client are purchased by the factor...'

[24] MP Factors' learned counsel said that the above illustrated that even when transactions in our case involve the sale and purchase of book debts, they are not moneylending transactions. Further there is not a single evidence that the factoring facility in our case is not a genuine factoring facility but a mere cloak for moneylending transactions. She went further to add that all documents adduced showed that the transactions is one of factoring and involves outright sale and assignment of book debts.

[25] The Federal Court case of *Boustead Trading Sdn Bhd (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 was further referred to by MP Factors' learned counsel. The court held: '.... A manufacturer or supplier would sell its goods to a third party on credit It would raise an invoice against the buyer for a sale. It then has a choice. It could wait until the end of the credit period expired and claim payment on the invoice. The factoring house having paid on the invoice then informs the buyer (with whose consent the agreement has been entered into) that on the expiry of the original period of credit, the full amount due on the invoice should be paid for it.... This more or less is the process that is known to men of commerce as factoring'. The agreement which the respondent had with Chemitrade was also on these lines. In order to properly work, it requires the cooperation of seller because it provides them with steady stream of cash flow. The courts should, as far as possible, uphold such transactions. Indeed, our courts have in the past done so in respect of similar transactions...'.

[26] It is not in dispute that MP Factors had applied for and obtained exceptions from Kementerian Perumahan dan Kerajaan Tempatan by way of letters dated 30 October 1996 and 23 March 2000 under s 2A(2) of the Money Lenders Act 1951 for a period of three years commencing 22 October 1996 and ending 21 October 1999 and a further period of one year commencing on 22 October 1999 and ending on 21 October 2000 respectively.

[27] DW1 for MP Factors said that the nature of business of MP Factors is one of factoring and not moneylending. She said that the application for exemption was

done 'just in case MP Factors wants to do some moneylending businesses'. It was said to be a cautious step and not to be interpreted as actually doing moneylending business.

[28] On the various charges imposed and the rolling over of charges, MP Factors' learned counsel contended that the charges were permitted by cll 1(i), 1(j) and 17(1) of the factoring agreement. On not seeking recourse against Seberai, MP Factors' learned counsel said that Layangan Bina had made various proposals to MP Factors to settle its outstanding debt due under the factoring facilities. The customer and Layangan Bina had also entered into a form of agreement dated 12 June 2000 with MP Factors whereby Layangan Bina, Layangan Sdn Bhd (the plaintiff in D8–22–1841 of 2000) and the customer had all confirmed being indebted to MP Factors for the sums stated therein and had also proposed to settle its debts. With various proposals made by both Layangan Bina and the customer, MP Factors had in the circumstances not taken recourse against the customer. Learned counsel submitted that MP Factors has a distinct and separate causes of action against Layangan Bina in respect of the outstanding sums under the factoring facilities.

[29] It was further submitted that it is usual for factoring houses to obtain securities. The case of *Olds Discount Co Ltd v John Playfair Ltd* [1938] 3 All ER 275 was referred to where the defendant there had also given a series of monthly bills to the plaintiff as security and yet the court held that the transaction is one of sale of book debts and not a moneylending transaction. Layangan Bina never paid the sum of RM10,470,798.39 and therefore there is no basis to seek the refund of that sum.

[30] On whether MP Factors is permitted to charge the initial payment charges ('IPC'), factoring Commission ("FC') and late payment charges/re-factoring charges ('LPC') or whether such charges constitute a penalty, MP Factors' counsel submitted that MP Factors has the right to vary the rate to be charged in terms of the IPC and FC from time to time and had duly notified Layangan Bina of the same. Learned counsel referred to the evidence of DW1 where she said that the FC was charged on each invoice for the services rendered by MP Factors to Layangan Bina in processing the Schedules and invoices submitted and also to render monthly statements of account to both Layangan Bina and Seberai. Learned counsel further said that the factoring facility allowed MP factors to charge the FC upon acceptance of an offer to purchase the debt from Layangan Bina vide cl 6(2) factoring agreement. Clause 6(2) provided that: 'The purchaser shall become entitled to the factoring commission on the relevant amount of the debt upon its acceptance of an offer pursuant to cl 3 and such factoring commission shall be deducted from the purchase price of the debt'.

[31] MP Factors' learned counsel further submitted that the IPC is charged upon the initial payments released to Layangan Bina from the time of release or funding until full settlement of the factoring facilities. The factoring facility also provides for MP Factors to charge Layangan Bina the IPC on any outstanding payment. Clause 16(1) provides that: 'The vendor shall pay the purchaser interest at the same rate as that applicable to the initial payment charge on any amounts due and owing

from the vendor to the purchaser and remaining unpaid from the date the sums are due until the date of actual payment notwithstanding the termination of the agreement.'

[32] As for increase of the IPC and FC from 11.75% to 22% and from 0.75% to 1.25%, MP Factors' teamed counsel explained that they were mainly at the time when the financial and currency crises occurred in late 1997 and 1998 which the court may take judicial notice of. It was contended that all borrowings at that time attracted very high interest rates.

[33] As to whether such charges constitutes a penalty, MP Factors' learned counsel referred to *Realvest Properties Sdn Bhd v Co-Operative Central Bank Ltd (in receivership)* [1996] 2 MLJ 461 where his Lordship Peh Seee Chin FCJ considered the interest rate of a bank loan, the variation of such interest and the additional interest upon such default and concluded that: 'Looking at cl 3.1, it provides for the 'starting rate' of interest at 14.5% pa and also on 'monthly rest'. There is nothing unusual or anything objectionable in this provision and the same can be said with regard to cl 3.3, a common clause which provides for the right of the bank to vary the interest as stipulated from time to time'.

[34] This to MP Factors' learned counsel is authority that even though the IPC is varied from time to time, at a rate that is similar to the normal interest rate in a bank loan, it is not caught by s 75 of the Contracts Act 1950. MP Factors' learned counsel said that the LPC is also not caught by s 75 of the Contracts Act 1950 since it is only imposed on each and every invoice amount which remains outstanding after 180 days. The IPC on the other hand is charged on the Initial Payments made from the date of funding. The LPC and IPC are therefore different from additional interest in that they are not charged side by side and also not charged on the same money lent or owed for the same span of time.

[35] Lastly, MP Factors' learned counsel said that Layangan Bina cannot complain that the LPC was excessive as they have agreed to the LPC rate of 1% per month on outstanding certificates of payments above 180 days from the date of the certificates of payment and which have not been varied from its inception. MP Factors' learned counsel referred to*Bumiputra Merchant Bank Berhad v The Melewar Corporation Berhad & 2 Ors* [1990] 2 CLJ 30 where Siti Norma Yaakob J (as she then was) said that ail additional interest of 2% p.a. was agreed upon and therefore the Defendant cannot complain that it was excessive.

[36] I have heard evidence from the witnesses and submissions made by the learned counsels. There really is one question that is left to be determined after all the evidence and submissions that had ensured. The question is whether the transaction is a money lending transaction disguised as a factoring Facility. The main criterion in order to determine whether MP Factors' business really is money lending as opposed to factoring is by looking at the real nature of a factoring business and the terms of the factoring Agreement itself. A factoring Agreement involves the assignment of book debts. An assignment of book debts is not a moneylending transaction. (See *Consolidated Factoring (M) Sdn Bhd v Tong Teik Co Sdn Bhd & 2 Ors* [1993] 1

CLJ 115). The factoring agreement involves the total assignment of debts by Layangan Bina to MP Factors. All the pre-requisites of the Agreement were fulfilled. The various schedules in Form A whereby Layangan Bina offered to sell its debts due by the customer to MP Factors together with all the relevant and supporting invoices certificates of payment due under the building contract were duly submitted by Layangan Bina to MP Factors. MP Factors had accepted the said offers and purchased the said debts and paid Layangan Bina the Initial Payments in accordance with the terms of the factoring Agreement. The customer was notified of the sale by a notice of assignment endorsed on the invoices. It states: 'Payable to MP Factors Sdn Bhd (MFSB) of 8th Floor, Menara MultiPurpose, Capital Square, No 8, Jalan Munshi Abdullah, 50100 Kuala Lumpur, Malaysia) who acquired this account Remittance is to be made directly to them. Only full payment to MPFSB will constitute full and proper discharge of your liability herein. Any objection to this bill or its items must be notified to them in writing within 14 days of its receipt, failing which this bill shall be deemed final and conclusive against you.'

[37] Layangan Bina alleged that the factoring agreement was a cloak to hide MP Factors' purported real business of moneylending. The fact that MP Factors had obtained an exemption under the Moneylenders Act 1951 was taken as proof that MP Factor was really in the business of money lending. DW1 had said that the application for exemption was done 'just in case MP Factors wants to do some moneylending businesses.' It was said to be a cautious step and not to be interpreted as actually doing moneylending business. Whatever the explanation, the pertinent question is still whether the factoring is in realty moneylending. I am satisfied that the transaction between the parties was clearly the purchase of debts under the factoring Agreements.

[38] The fact that securities were required and given by Layangan Bina does not change the character of the transaction. factoring houses do obtain securities and this is evident from the facts of *Olds Discount Co Ltd v John Playfair Ltd* [1938] 3 All ER 275 where the defendant there had also given a series of monthly bills to the plaintiff as security and yet the court held that the transaction is one of sale of book debts and not a moneylending transaction. Branson J at p 277 said that: '... there is no doubt that, if it be the fact that the agreement entered into between these parties was an agreement for the purchase of book debts, the agreement is perfectly good and lawful agreement, notwithstanding that the operative reason in the minds of the defendants for entering into it was that they desired money as a temporary matter in the same way as they would have raised it if they had merely entered into transaction of loan. In other words, it is the nature of the agreement entered into, and not its object, at which the court has to look in order to decide whether in any particular case the agreement is a moneylending agreement or otherwise...'

[39] Layangan Bina had referred to the various charges imposed to justify its arguments. The question is whether MP Factors is permitted to charge the initial payment charges ('IPC'), factoring Commission ('FC') and late payment charges/Refactoring Charges ('LPC') or whether such charges constitute a penalty. MP Factors has the contractual right to vary the rate to be charged in terms of the IPC and FC from time to time and had duly notified Layangan Bina of the same.

DW1 gave evidence that the FC was charged on each invoice for the services rendered by MP Factors to Layangan Bina in processing the Schedules and invoices submitted and also to render monthly statements of account to both Layangan Bina and the customer. The factoring facility further provided that MP Factors charge the FC upon acceptance of an offer to purchase the debt from the plaintiff vide cl 6(2) of the factoring agreement. On the other had, IPC is charged upon the initial payments released to Layangan Bina from the time of release or funding until full settlement of the factoring facilities, and this is likewise permitted under cl 16(1) of the agreement.

[40] As for increase of the IPC and FC from 11.75% to 22% and from 0.75% to 1.25%, I had taken judicial notice that they were mainly at the time when the financial and currency crises occurred in late 1997 and 1998 and that all borrowings at that time attracted very high interest rates.

[41] As to whether such charges constitute a penalty, the case of *Realvest Properties Sdn Bhd v Co Operative Central Bank Ltd (In Receivership)* [1996] 2 MLJ 461 cited by MP Factors' learned counsel held that: '...there is nothing unusual or anything objections in the provisions for variation of interest rate and default interest in the agreement' Even though the IPC is varied from time to time, at a rate that is similar to the normal interest rate in a bank loan, it is not caught by s 75 of the Contracts Act 1950. Likewise, the LPC is also not caught by s 75 of the Contracts Act 1950 since it is only imposed on each and every invoice amount which remains outstanding after 160 days. The IPC on the other hand is charged on the Initial Payments made from the date of funding. Taking Peh Swee Chin FCJ's comments in *Realvest Properties* on additional interest, the IPC and LPC are not the same as additional interest as they are not charged side by side and also not charged on the same money lent or owed for the same span of time. In any event the charges are agreed upon.

[42] I am also satisfied with MP Factors' explanation as to why they had not taken recourse against the customer. MP Factors was said to have deliberately failed to move to seek recourse from the vendor when the customer defaulted in payment. MP Factors it was said choose to roll over the defaulting balance and levy an interest charge as an 'initial factoring charge' that was continuous. MP Factors had explained that Layangan Bina had made various proposals to MP Factors to settle its outstanding debt due under the factoring facilities and the customer and Layangan Bina had also entered into a form of agreement dated 12 June 2000 with MP Factors whereby Layangan Bina, Layangan Sendirian Berhad (the plaintiff in D8–22–1841 of 2000) and the customer had all confirmed being indebted to MP Factors for the sums stated therein and had also proposed to settle its debts. Layangan Bina and the customer had made various proposals and it is understandable why at that stage MP Factors had not taken recourse against the customer under the circumstances. The fact that MP Factors had deferred recourse against the customer does not convert the transaction to one of moneylending.

[43] From the testimony of witnesses and the contemporaneous documents before the court. I am satisfied that MP Factors had complied with s 21(1) of the Banking

A and Financial Institutions Act 1989 ('BAFIA') in respect of a factoring business, a scheduled business listed under the Third Schedule of the BAFIA as acknowledged by Bank Negara Malaysia and that no evidence was led to prove otherwise. I am also satisfied that Layangan Bina did not pay the sum of RM10,470,798.39 to MP Factors and therefore there is no basis to seek the refund of that sum. I accordingly
B dismissed Layangan Bina's claim with costs. On the counterclaim, I hold that MP Factors had validly terminated the factoring Agreement pursuant to cl 25(1)(b) and properly demanded from Layangan Bina and the Guarantors vide its solicitors' letter dated 7 March 2000. I therefore allowed MP Factors' counterclaim of RM6,361,466.78 with costs against all defendants.

C *Countercliam allowed with costs.*

Reported by Sally Kee

D

E

F

G

H

I